



4910-9X

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 8

RIN 2105-AE50

Classified Information: Classification/Declassification/Access; Authority to Classify Information (RRR)

AGENCY: Office of the Secretary of Transportation (OST), U.S. Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule updates the regulations regarding classified information to reflect changes in organizational structure, update the legal authorities, incorporate new references, and refer historical researchers and former Presidential appointees to Executive Order 13526.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Joan Harris, Associate Director, Office of Security, 202-366-1827, or electronically at joan.harris@dot.gov. You may also contact David Meade, Senior Security Specialist, Office of Security, 202-366-8891, or electronically at david.meade@dot.gov.

SUPPLEMENTARY INFORMATION: A 2011 DOT final rule (76 FR 19707) announced changes regarding the authority to classify information, but did not update other parts of the rule. As a result, the Department's regulations at 49 CFR part 8 need to

be updated. This final rule makes the following corrections: Executive Order 12958, “Classified National Security Information,” has been replaced by Executive Order 13526, so references to the outdated Executive Order have been removed. The “Interagency Classification Review Committee” is now the Interagency Security Classification Appeals Panel. As a result of reorganizations after the September 11, 2001, terrorist attacks, the U.S. Coast Guard is no longer a part of DOT, so references to that agency as a departmental component have been removed, and a representative from the Federal Highway Administration replaces the U.S. Coast Guard’s representative on the Department’s Personnel Security Review Board. This final rule also updates the names of some departmental offices, which have changed.

Section 8.19, which contained detailed instructions for submitting and processing requests for classification challenges and mandatory classification reviews, is also eliminated because of inconsistencies with the current regulations at 32 CFR 2001. Sections 8.15 (Mandatory review for classification) and 8.17 (Classification challenges) have been rewritten to cite the appropriate sections of 32 CFR 2001 regarding such requests.

The detailed instructions in Section 8.29, Access by historical researchers and former Presidential appointees, have been eliminated because they were outdated. Instead, the instructions have been replaced with a reference to Executive Order 13526, which describes the conditions that qualify such persons for access, and Executive Order 12968 which provides general guidelines for access to classified information.

This final rule is exempt from Administrative Procedure Act (APA) notice-and-comment requirements. This final rule does not affect any substantive changes to the

regulations or alter any existing compliance obligations. This final rule would only make technical corrections to part 8 by correcting outdated references without affecting the substance of the underlying rulemaking document. For the reasons stated above, notice and comment procedures are unnecessary within the meaning of the APA. See 5 U.S.C. 553(b)(3)(B).

The Department finds good cause for this final rule to become effective immediately under 5 U.S.C. 553(d)(1). This final rule is only removing outdated, obsolete, and inconsistent language in the regulations without altering any existing compliance obligations contained in the current regulations. Since this final rule is nonsubstantive and will not affect any regulated entity's compliance with the current regulations, the Department finds good cause for it to become effective immediately.

Regulatory Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

The DOT has determined that this action is not a significant regulatory action within the meaning of Executive Order 12866, and within the meaning of DOT's regulatory policies and procedures. Since this rulemaking merely removes obsolete and inconsistent language and makes editorial corrections and does not have any substantive impact on the regulated community, DOT anticipates that this rulemaking will have no economic impact.

Additionally, this action fulfills the principles of Executive Order 13563, specifically those relating to retrospective analyses of existing rules. This rule is being issued as a result of the reviews of existing regulations that the Department periodically conducts. In addition, these changes will not interfere with any action taken or planned

by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not necessary.

B. Executive Order 13132

Executive Order 13132 requires agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and the DOT has determined that this action would not have a substantial direct effect or sufficient federalism implications on the States. The DOT has also determined that this action would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions. Therefore, consultation with the States is not necessary.

C. Executive Order 13175

The DOT has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that the action would not have substantial direct effects on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal laws. This final rule merely updates outdated terminology, and removes inconsistent language relating to compliance with the Department's classified information regulations. It does not impose any new

requirements on Indian tribal governments. Therefore, a tribal summary impact statement is not required.

D. Regulatory Flexibility Act

Since notice-and-comment rulemaking is not necessary for this rule, the provisions of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612) do not apply. However, the DOT has evaluated the effects of this action on small entities and has determined that the action would not have a significant economic impact on a substantial number of small entities. The rule removes obsolete guidance language and updates outdated terminology and, therefore, does not add to or alter any existing obligations.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et seq.), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The DOT has analyzed this final rule under the PRA and has determined that this rule does not contain collection of information requirements for the purposes of the PRA.

F. Unfunded Mandates Reform Act

This final rule would not impose unfunded mandates, as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48, March 22, 1995), as it will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$148.1 million or more in any one year (2 U.S.C. 1532).

G. National Environmental Policy Act

The agency has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. Id. Paragraph 3.c.5 of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Highway Administration's implementing procedures, "[p]romulgation of rules, regulations, and directives." 23 CFR 771.117(c)(20). The purpose of this rulemaking is to make editorial corrections and remove obsolete and inconsistent language in the Department's classified information regulations. The agency does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

List of Subjects in 49 CFR Part 8

Classified Information (Government agencies), Classification/Declassification/Access (Government agencies).

The Final Rule

For the reasons set forth in the preamble, OST amends 49 CFR part 8 as follows:

PART 8—[AMENDED]

1. The authority citation for part 8 is revised to read as follows:

AUTHORITY: E.O. 10450, 18 FR 2489, 3 CFR, 1949-1953 Comp., p. 936, amended by E.O. 10491, 18 FR 6583, 3 CFR, 1949-1953 Comp., p. 973, E.O. 10531, 19 FR 3069, 3 CFR, 1949-1953 Comp., p. 973, E.O. 10548, 19 FR 4871, 3 CFR, 1954-1958 Comp., p. 200, E.O. 10550, 19 FR 4981, 3 CFR, 1954-1958 Comp., p. 200, E.O. 11605, 20 FR 2747, 3 CFR, 1971-1975 Comp., p. 580, E.O. 11785, 39 FR 20053, 3 CFR, 1971-1975 Comp., p. 874, E.O. 12107, 44 FR 1055, 3 CFR, 1978 Comp., p. 266; E.O. 12829, 58 FR 3479, 3 CFR, 1993 Comp., p. 570, amended by E.O. 12885, 58 FR 65863, 3 CFR, 1993 Comp., p. 684; E.O. 13526, 75 FR 707, 3 CFR, 2010 Comp., p. 298; E.O. 12968, 3 CFR, 1995 Comp., p. 391, amended by E.O. 13467, 73 FR 38103, 3 CFR, 2009 Comp., p. 196.

2. Part 8 is amended by:

- a. Removing “Director of Security and Administrative Management” and adding in its place “Director of Security” wherever it appears; and
- b. Removing “Executive Order 12958” and adding in its place “Executive Order 13526” wherever it appears.

Subpart A—General

3. Section 8.1 is revised to read as follows:

§ 8.1 Scope.

This part sets forth procedures for the classification, declassification, and availability of information that must be protected in the interest of national security, in implementation of Executive Order 13526 of December 29, 2010, “Classified National Security

Information;” and for the review of decisions to revoke, or not to issue, national security information clearances, or to deny access to classified information, under Executive Order 12968 of August 2, 1995, “Access to National Security Information,” as amended by Executive Order 13467 of June 30, 2008, “Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information.”

4. In § 8.5, add a definition for “Authorized holder” and revise the definitions of “Clearance”, “Damage to the national security”, “Mandatory declassification”, and “Original classification authority” to read as follows:

§ 8.5 Definitions.

* * * * *

Authorized holder is any individual who has been granted access to specific classified information in accordance with Executive Order 13526 or any successor order.

* * * * *

Clearance means that an individual is eligible, under the standards of Executive Orders 10450, 12968, 13467, and appropriate DOT regulations, for access to classified information.

Damage to the national security means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information.

* * * * *

Mandatory declassification review means the review for declassification of classified information in response to a request for declassification that meets the requirements of section 3.5 of Executive Order 13526.

* * * * *

Original classification authority means an individual authorized in writing, either by the President, the Vice President, or by agency heads or other officials designated by the President, to classify information in the first instance.

5. In § 8.7, paragraph (a) is revised to read as follows:

§ 8.7 Spheres of responsibility.

(a) Pursuant to section 5.4(d) of Executive Order 13526, and to section 6.1 of Executive Order 12968, the Assistant Secretary for Administration is hereby designated as the senior agency official of the Department of Transportation with assigned responsibilities to assure effective compliance with and implementation of Executive Order 13526, Executive Order 12968, Office of Management and Budget Directives, the regulations in this part, and related issuances.

* * * * *

Subpart B—Classification/Declassification of Information

6. In § 8.9, paragraphs (a) introductory text and (b) are revised to read as follows:

§ 8.9 Information Security Review Committee.

(a) The Department of Transportation Information Security Review Committee has the authority to:

* * * * *

(b) The Information Security Review Committee will be composed of the Assistant Secretary for Administration, who will serve as Chair; the General Counsel; and the Director of Security. When matters affecting a particular Departmental component are at issue, the Associate Administrator for Administration for that component (or for the Federal Aviation Administration, the Associate Administrator for Security and Hazardous Materials Safety) will participate as an ad hoc member, together with the Chief Counsel of that component. Any regular member may designate a representative with full power to serve in his/her place.

* * * * *

7. In § 8.11, paragraphs (a), (b)(1) and (2), and (c) are revised to read as follows:

§ 8.11 Authority to classify information.

(a) Presidential Order of December 29, 2009, “Original Classification Authority” confers upon the Secretary of Transportation the authority to originally classify information as SECRET or CONFIDENTIAL with further authorization to delegate this authority.

(b) * * *

(1) *Office of the Secretary of Transportation.* The Deputy Secretary; Assistant Secretary for Administration; Director of Intelligence, Security and Emergency Response; Director of Security.

(2) *Federal Aviation Administration.* Administrator; Associate Administrator for Security and Hazardous Materials Safety.

* * * * *

(c) Although the delegations of authority set out in paragraph (b) of this section are expressed in terms of positions, the authority is personal and is invested only in the

individual occupying the position. The authority may not be exercised “by direction of” a designated official. The formal appointment or assignment of an individual to one of the identified positions or a designation in writing to act in the absence of one of these officials, however, conveys the authority to originally classify information as SECRET or CONFIDENTIAL.

* * * * *

8. Revise § 8.15 to read as follows:

§ 8.15 Mandatory review for classification.

(a) Mandatory declassification review requests will be processed in accordance with 32 CFR 2001.33.

(b) Except as provided in paragraph b of section 3.5 of Executive Order 13526, all information classified by the Department of Transportation under Executive Order 13526 or predecessor orders shall be subject to a review for declassification if:

- (1) The request for review describes the information with sufficient specificity to enable its location with a reasonable amount of effort;
- (2) The information has not been reviewed for declassification within the prior two years. If the information has been reviewed within the prior two years, or the information is the subject of pending litigation, the requestor will be informed of this fact, and of the Department’s decision not to declassify the information and of his/her right to appeal the Department’s decision not to declassify the information to the Interagency Security Classification Appeals Panel (ISCAP);
- (3) The document or material containing the information responsive to the request is not contained within an operational file exempted from search and review, publication, and disclosure under 5 U.S.C. 552 in accordance with law; and

- (4) The information is not the subject of pending litigation.
- (c) All information reviewed for declassification because of a mandatory review will be declassified if it does not meet the standards for classification in Executive Order 13526. The information will then be released unless withholding is otherwise authorized and warranted under applicable law.
- (d) Mandatory declassification review requests for information that has been classified by the Department of Transportation may be addressed to the Director of Security, US Department of Transportation, 1200 New Jersey Avenue, Washington, DC 20590. The Director will forward the request to the appropriate Departmental Original Classification Authority for processing.
- (e) Denied requests may be appealed to the DOT Information Security Review Committee (DISRC) through the Director of Security within 60 days of receipt of the denial. If the DISRC upholds the denial, it will inform the requestor of his or her final appeal rights to the ISCAP.

9. Revise § 8.17 to read as follows:

§ 8.17 Classification challenges.

- (a) Authorized holders of information classified by the Department of Transportation who, in good faith, believe that its classification status is improper are encouraged and expected to challenge the classification status of the information before the Original Classification Authority (OCA) having jurisdiction over the information. A formal challenge must be in writing, but need not be any more specific than to question why information is or is not classified, or is classified at a certain level.

(b) Classification challenges to DOT information must be addressed to the DOT Original Classification Authority (OCA) who is responsible for the information. If unsure of the OCA, address the challenge to the DOT Director of Security.

(c) Classification challenges will be processed according to 32 CFR 2001.14.

§ 8.19 [Removed and Reserved]

10. Remove and reserve § 8.19.

§ 8.21 [Amended]

11. Amend § 8.21 by removing “8.13,” and the comma following “8.15”, and by removing the word “agency” and adding “component” in its place.

§ 8.23 [Amended]

12. Amend § 8.23 as follows:

- a. In paragraph (a) by adding an “s” to the word “function”;
- b. In paragraph (b) by removing the word “a” and adding in its place the word “another” in the first sentence and by adding the words “at a lower level” after the word “resolved” in the last sentence;
- c. In paragraph (c) by adding “, directives issued pursuant to Executive Order 13526,” after the words “Executive Order 13526” in the first sentence and in the second sentence by removing the words “in NARA” and adding in their place “into the National Archives”; and
- d. In paragraph (d) by removing the words “of this part for automatic declassification” at the end of the first sentence, and adding in their place “for automatic declassification in section 3.3 of Executive Order 13526 and its implementing directives”.

Subpart C—Access to Information

13. 13. In § 8.25, revise paragraphs (a) introductory text and (b)(1) through (4) and add paragraph (b)(5) to read as follows:

§ 8.25 Personnel Security Review Board.

(a) The Department of Transportation Personnel Security Review Board will, on behalf of the Secretary of Transportation (except in any case in which the Secretary personally makes the decision), make the administratively final decision on an appeal arising in any part of the Department from:

* * * * *

(b) * * *

(1) Two persons appointed by the Assistant Secretary for Administration: one from the Office of Human Resource Management, and one, familiar with personnel security adjudication, from the Office of Security, who will serve as Chair;

(2) One person appointed by the General Counsel, who, in addition to serving as a member of the Board, will provide to the Board whatever legal services it may require;

(3) One person appointed by the Administrator of the Federal Aviation Administration; and

(4) One person appointed by the Administrator of the Federal Highway Administration.

(5) Any member may designate a representative, meeting the same criteria as the member, with full power to serve in his/her place.

* * * * *

14. Section 8.29 is revised to read as follows:

§ 8.29 Access by historical researchers and former Presidential appointees.

Access to classified information may be granted to historical researchers and former Presidents and Vice-Presidents and their appointees as outlined in Executive Order 13526 or its successor order. The general guidelines for access to classified information are contained in Executive Order 12968.

15. In § 8.31, amend paragraph (b) by adding the word “an” between “into agreement” in the first sentence and by removing the last three sentences and adding a new sentence in their place.

The addition reads as follows:

§ 8.31 Industrial security.

* * * * *

(b) * * * Specifically, this regulation is DOD 5220.22–M, National Industrial Security Program Operating Manual, and is effective within the Department of Transportation. Appropriate security staff, project personnel, and contracting officers must assure that actions required by the regulation are taken.

Issued in Washington, DC, on July 5, 2016, under authority delegated in 49 CFR 1.27(c).

Molly J. Moran,

Acting General Counsel.

